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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. T.J. WHEELER, Defendant and Appellant.	F038303 (Super. Ct. No. 61361) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Martin Staven, Judge.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stephen G. Herndon and David Andrew Eldridge, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found T.J. Wheeler guilty of first degree murder, attempted voluntary manslaughter, and discharge of a firearm at an inhabited dwelling. (Pen. Code, §§ 187, 664/192, subd. (a), 246.) He argues his wife's statement to him shortly before the murder

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II. and III.B.

that she committed adultery with the man whom he killed not long afterward was violative of the hearsay rule and insufficiently trustworthy to pass confrontation clause muster. In the published portion of our opinion, we will hold that the court properly admitted his wife's statement under the social interest exception to the hearsay rule and that the evidence was sufficiently trustworthy to satisfy the confrontation clause. (Evid. Code, § 1230;[1] U.S. Const., 6th & 14th Amends.)

The parties disagree whether the statutory denial of presentence custody credits to "any person who is convicted of murder" applies to the offender (entirely barring those credits) or only to the offense (allowing those credits on any offense other than murder). (Pen. Code, § 2933.2.) In the published portion of our opinion, we will hold that Penal Code section 2933.2 applies to the offender not to the offense (entirely barring those credits). In the unpublished portion of our opinion, we will address other contentions of error and direct correction of the abstract of judgment.

FACTUAL HISTORY

Three young men—Ruben Sanchez (Ruben), his brother Jermaine Sanchez (Jermaine), and Eric Buckingham—stepped out of the Sanchez home after Wheeler asked to speak to Ruben. Referring to his wife, Gracie Wheeler (Gracie), Wheeler asked, "'What do you know about Gracie?'" Gracie and Ruben had dated each other in high school. Jermaine said, "'We don't know nothing about Gracie. Why don't you get out of here[?]'" After Jermaine said, "Nobody cares about [Gracie,]" Wheeler lunged at him. Scared that Wheeler was about to hit him, Jermaine punched him twice in the face.

Wheeler fell to the ground and got up with a firearm in his hand. Ruben, Jermaine, and Buckingham took off running. Wheeler fired three rounds toward the door through which Jermaine was running back inside. Buckingham saw Wheeler outside

[1] Statutory references not otherwise noted are to the Evidence Code.

within an arm's length of Ruben. After Jermaine and Buckingham both heard three more shots, Buckingham saw Wheeler take off in his car and saw Ruben fall to the ground.[2]

DISCUSSION

I. Statement Admitting Adultery

Anticipating Gracie's invocation of her spousal privilege not to testify against Wheeler, both parties sought rulings in limine on the admissibility of her statement to Wheeler about her adultery with Ruben shortly before his murder. (§ 970.) The prosecutor characterized her statement as admissible nonhearsay and, in the alternative, as admissible hearsay under the social interest exception. (§ 1230.) Wheeler characterized her statement as inadmissible hearsay. (§ 1200.) Once Gracie refused to testify, the court found her statement relevant as evidence of a motive to harm Ruben and admissible under the social interest exception.

Wheeler argues Gracie's statement to him about her adultery with Ruben shortly before his murder was violative of the hearsay rule and insufficiently trustworthy to pass confrontation clause muster. (U.S. Const., 6th Amend.) The Attorney General argues the court committed no statutory or constitutional error in admitting the statement under the social interest exception.

Our analysis commences with the language of the statute:

> "Evidence of a statement [1] *by a declarant having sufficient knowledge of the subject* is not made inadmissible by the hearsay rule [2] *if the declarant is unavailable as a witness* and [3] *the statement*, *when made*, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected [her] to the risk of civil or criminal liability, or so far tended to render invalid a claim by [her] against another, or *created such a risk of making [her] an object of hatred*, *ridicule*, *or social disgrace in the community*, *that a reasonable [wo]man in [her] position would not have made the statement unless [s]he believed it to be true*." (§ 1230, italics added.)

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[2]Other relevant facts appear in the discussion of the issues on appeal.

Wheeler agrees Gracie's statement to Wheeler about her adultery with Ruben shortly before his murder gave her "sufficient knowledge of the subject" to satisfy the first statutory requirement. He agrees her invocation of the spousal privilege satisfied the second statutory requirement since she was "unavailable as a witness." He takes issue with the third statutory requirement, which requires that her "statement, when made, … created such a risk of making [her] an object of hatred, ridicule, or social disgrace in the community, that a reasonable [wo]man in [her] position would not have made the statement unless [s]he believed it to be true."

California is among a minority of jurisdictions that have either adopted by statute or embraced by case law the social interest exception. (See Note, *Sin*, *Suffering*, *and "Social Interest": A Hearsay Exception for Statements Subjecting the Hearsay Declarant to "Hatred*, *Ridicule*, *or Disgrace*" (1985) 4 Rev. Litig. 367, fn. 4, 368, fn. 5 (hereafter *A Hearsay Exception*).) Even in jurisdictions that permit admission of statements against social interest, "litigants and judges rarely invoke that theory as a basis for admitting hearsay testimony." (Imwinkelried, *Declarations Against Social Interest: The* (*Still*) *Embarrassingly Neglected Hearsay Exception* (1996) 69 So.Cal. L.Rev. 1427, 1431.)

California adopted the social interest exception in 1965 as an integral part of the original Evidence Code. (§ 1230; Stats. 1965, ch. 299, § 2.) The intent of the Law Revision Commission, which recommended legislative adoption of the new code, was to make the social interest exception "sufficiently broad" to admit previously inadmissible statements about illegitimacy, pregnancy out of wedlock, and impotency (*A Hearsay Exception*, *supra*, 4 Rev. Litig. at p. 385, fn. 81):

> "A man admits paternity of an illegitimate child; an unmarried woman states that she is pregnant; a man states that he is impotent. Professor McCormick refers to these statements as declarations against 'social interests.' Currently such declarations are usually excluded. Under the new rule they would be admitted—in our opinion, wisely so." (Tentative Recommendation and A Study Relating to the Uniform Rules of Evidence (Aug. 1962) 4 Cal. Law Revision Com. Rep. (1963) p. 501; fns. omitted.)

Implicit in Gracie's statement about adultery was a breach of trust conspicuously absent from illegitimacy, pregnancy out of wedlock (without reference to adultery), and impotency—the three statements expressly within the contemplation of the Law Revision Commission in recommending the admission of those statements under the social interest exception. Arguably the breach of trust that is implicit in adultery accounts in part for the "strong condemnation of adultery in all religions." (See *Oxford Dict. of World Religions* (1997) p. 21 [defining "adultery"].) As one of numerous factors establishing who is and who is not "an object of … social disgrace in the community" (§ 1230), clerical disapprobation indubitably influences societal mores. A statement to one's spouse about adultery certainly runs no smaller risk, and arguably incurs a greater risk, of making the declarant an object of social disgrace than do any of the three statements the Law Revision Commission expressly intended the social interest exception to embrace.

Since California Supreme Court authority guides us in the construction of statutory provisions, we turn to two cases adjudicating the applicability of the social interest exception to other kinds of statements. (See *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 924.) In the first case, *In re Weber* (1974) 11 Cal.3d 703, a prison inmate who testified the petitioner solicited him to offer a bribe later told another inmate his testimony was perjury. (*Id*. at pp. 711-712.) At a posttrial evidentiary hearing, the petitioner sought in vain to introduce the statement under the social interest exception after the inmate who heard the statement invoked the privilege against self-incrimination. (*Id*. at pp. 712-713.) On the rationale that an admission of perjury might both impair and improve one's social standing in the inmate community, the Supreme Court upheld the exclusion of the statement. (*Id*. at p. 722.) In the case at bar, on the other hand, nothing in the record suggests Gracie's statement about adultery could possibly have improved her social standing with anyone.

The Supreme Court grounded the holding in *Weber* not only on doctrine intrinsic to the social interest exception but also on two extrinsic rules of law. (*In re Weber*, *supra*, 11 Cal.3d at p. 722.) Both of those rules derive from the "various motives" prison

inmates may have "for making false statements, not the least of which is a possible desire to curry favor with the authorities." (*Ibid*.) First, evidence of a witness's posttrial offer to retract sworn testimony is to be viewed with suspicion. (*Ibid*.) Second, evidence that a fellow inmate heard a retraction is even more unworthy of belief. (*Ibid*.) In the case at bar, on the other hand, no comparable extrinsic rules of law come into play.

In the second case, *People v. Lawley* (2002) 27 Cal.4th 102, a prison inmate seeking full membership in the Aryan Brotherhood told another inmate that he killed the victim on a gang contract and that an innocent person was in custody for the murder. (*Id.* at pp. 151-155.) After the inmate who made the statement later invoked the privilege against self-incrimination, the accused sought admission of the evidence under the social interest exception. (*Id*. at p. 155.) On the rationale that the intent of the inmate's statement could have been to enhance his own prestige or that of the Aryan Brotherhood, the Supreme Court upheld the trial court's refusal to admit the evidence. (*Ibid*.) We note again, as before, that nothing in the record in the case at bar suggests Gracie's statement about adultery could have improved her social standing with anyone.

In two cases decided before section 1230 took effect in 1967, we recognized the validity of the common law precursor to the social interest exception. In the first case, *People v. Parriera* (1965) 237 Cal.App.2d 275, the issue was whether the accused shot his wife or whether she shot herself. (*Id*. at p. 277.) The trial court permitted two nurses to testify they heard her volunteer she shot herself. (*Id*. at p. 282.) The trial court "severely restricted" the impact of that statement by limiting jury consideration to her credibility as a witness and by prohibiting jury consideration on the issue of her culpability as the shooter. (*Ibid*.) Noting that admissible hearsay evidence usually "has a high degree of trustworthiness" (*People v. Spriggs* (1964) 60 Cal.2d 868, 874), we held that to so limit the jury's consideration of that evidence was "unjust" since the wife's statement would "subject her to odium." (*People v. Parriera*, *supra*, at pp. 284-285.)

In the second case, *People v. Salcido* (1966) 246 Cal.App.2d 450, the issue was whether the accused shot his girlfriend or whether she shot herself. (*Id*. at p. 457.) The

trial court admitted the girlfriend's suicide threat. (*Ibid*.) The statement was not only probative of the identity of the shooter but also revelatory of her emotional instability and predisposition to self-destruction. (*Id*. at pp. 457-462.) In holding the statement admissible for the truth of the matter, we followed two murder cases from the late 19th and early 20th Centuries on the general trustworthiness of like hearsay evidence. (*Ibid*.) In the late 19th Century case, the Supreme Court of Massachusetts ruled admissible the threat of the decedent—a single pregnant woman—to kill herself. (*Commonwealth v. Trefethen* (1892) 157 Mass. 180, 181-195 [31 N.E. 961, 961-967].) In the early 20th Century case, the Supreme Court of Missouri ruled admissible the decedent's threats—"as original evidence of the condition of the mind from which they spring" —to kill himself. (*State v. Ilgenfritz* (1915) 263 Mo. 615, 631-635 [173 S.W. 1041, 1045-1046].)

To the issue whether the court properly admitted Gracie's statement under the social interest exception to the hearsay rule, the parties agree the abuse of discretion standard of review applies. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1252, overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 834-835.) By that standard, we hold that the court committed no abuse of discretion.

Even if Gracie's statement satisfied the third statutory requirement, Wheeler argues the evidence lacked the trustworthiness necessary to pass confrontation clause muster. (U.S. Const., 6th & 14th Amends.) As one of Shakespeare's characters warned, "'The purest treasure mortal times afford, Is spotless reputations, that way, Men are but guilded loam or painted clay.'" (*A Hearsay Exception*, *supra*, 4 Rev. Litig. at pp. 391-392, fn. omitted, quoting Shakespeare, Richard II, act I, scene 1.) The human hesitancy to blemish one's "'treasure that mortal times afford'" creates the circumstantial guarantee of trustworthiness that is implicit in the social interest exception. (*A Hearsay Exception*, *supra*, at p. 392; fn. omitted.)

A case from another state that adopted by statute the social interest exception specifically adjudicated the impact on that "treasure" of a spouse's statement about adultery. (*Muller v. State* (1980) 94 Wis.2d 450 [289 N.W.2d 570].) As in the case at

bar, the cuckold in that case killed the paramour of the spouse who admitted adultery. (*Id*. at pp. 453-464 [289 N.W.2d at pp. 572-577].) The Wisconsin Supreme Court held that the spouse's statement at a civil deposition about adultery with her paramour satisfied the social interest exception since her own words "made her an 'object of disgrace.'" (*Id*. at p. 463 [289 N.W.2d at p. 577].) Noting the right to confrontation "is not absolute," the court found no confrontation clause violation. (*Id*. at pp. 463-464 [289 N.W.2d at pp. 577-578]; see *Barber v. Page* (1968) 390 U.S. 719, 722; *People v. Alcala* (1992) 4 Cal.4th 742, 784.)

Although the statement in the case at bar occurred during a homicide investigation and not, as in *Muller*, during a civil deposition, the broad assumption is common to both that "'a person is unlikely to fabricate a statement against his [or her] own interest at the time it is made.'" (See *Lilly v. Virginia* (1999) 527 U.S. 116, 126, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 299.) Embracing penal, proprietary, and social interests alike, the general hearsay exception for declarations against interest is a "'firmly rooted'" doctrine with the "'longstanding judicial and legislative experience'" to ensure "'virtually any evidence'" within its scope "'comports with the "substance of the constitutional protection."'" (See *Lilly v. Virginia*, *supra*, at p. 126, quoting *Idaho v. Wright* (1990) 497 U.S. 805, 817, and *Ohio v. Roberts* (1980) 448 U.S. 56, 66.) We note again, as before, that the common law roots of the social interest exception long predate the adoption of section 1230.

In the opinion of at least a plurality of the United States Supreme Court, appellate courts should independently review whether the government's proffered guarantees of the trustworthiness of a hearsay statement satisfy the confrontation clause. (*Lilly v. Virginia*, *supra*, 527 U.S. at p. 136.) To make the original determination whether a hearsay statement "passes the required threshold of trustworthiness," trial courts "'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.'" (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) With no apparent motive to

lie, Gracie made her statement about her relationship with the victim to her husband in a homicide investigation in which she was not a suspect. The intoxicated in-custody suspect in *Lilly*, on the other hand, trying to shift blame to other people in a homicide investigation, had every motive to lie. (*Lilly v. Virginia*, *supra*, at pp. 121-122.) The United States Supreme Court held that the admission of the suspect's statement in *Lilly* violated the confrontation clause. (*Id*. at p. 139.)

On the strikingly dissimilar circumstances in the case at bar, we hold that Gracie's statement was sufficiently trustworthy to satisfy the confrontation clause. In so holding, we review solely for abuse of discretion. (See *People v. Cudjo*, *supra*, 6 Cal.4th at p. 607.) Even were we to engage in review de novo, we would still so hold. (See *Lilly v. Virginia*, *supra*, 527 U.S. at pp. 136-137.)

II. Possible Juror Misconduct*

During deliberations, Wheeler's father approached a juror and asked, "'Excuse me, do you know how long you're going to take?'" The juror "ignored him completely" and returned immediately to the jury room, where she told three other jurors who were already there "just that the gentleman got up and asked [her] a question." The court asked, "You mentioned that somebody had approached you?" "Right, that's all," she replied. "Nothing," she added. The court asked, "Do you have any idea who the gentleman is?" "I don't know," she replied. The court inquired, "Do you think there's anything about what's happened that would affect your ability to be a fair juror?" "No," she replied.

Out of the juror's presence, the court stated to counsel, "We can do a whole big thing here. I don't want to. Doesn't sound like it was a big thing to the other jurors." The court suggested an instruction that the juror simply not talk about the gentleman who approached her and just concentrate on her job as a juror. The court asked if counsel had any input. Wheeler's counsel answered, "No, other than we may want to have the

*See footnote, *ante*, page 1.

hallway cleared." The prosecutor was silent. The court ordered the bailiff to monitor the hallways.

The court brought the juror back and instructed her "to go back in and just begin deliberating as though nothing had happened" and not to "mention anything more to anybody about what happened or even speculate about it." The juror answered, "That sounds fine." After she returned to the jury room, the court ordered Wheeler's father out of the courthouse for the duration of the trial. The court asked if counsel wanted to put anything on the record. Both counsel answered, "No."

Wheeler argues the court's failure to conduct additional inquiry into possible juror misconduct constituted a prejudicial violation of his constitutional rights to a fair trial, an impartial jury, and due process. (U.S. Const., 5th, 6th, & 14th Amends.) The Attorney General argues he forfeited his right to raise the issue on appeal by not requesting additional inquiry at trial and in any event there was no juror misconduct.

On the forfeiture issue, Wheeler argues any objection he might have made at trial would have been futile. If neither the court nor counsel could have done anything at that time to obviate prejudice, if any, his argument might have merit. (Cf. *People v. Green* (1980) 27 Cal.3d 1, 28, overruled on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, 241.) However, the full panoply of remedies available at the time when the court solicited input from counsel—from admonishing the jury to declaring a mistrial—vitiates his argument. Had he requested additional inquiry, the court could have so inquired and taken ameliorative steps, if necessary, to cure prejudice, if any. We hold that he forfeited his right to raise his juror misconduct issue on appeal under the "well-established procedural principle" that generally precludes appellate review of "claims of error that could have been—but were not—raised in the trial court." (*People v. Vera* (1997) 15 Cal.4th 269, 275.) "[S]trong policy reasons" underlie that principle: "It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided." (*Id*. at p. 276.) A contemporaneous objection was necessary for him to secure appellate review of

his juror misconduct issue. (See *People v. Wisely* (1990) 224 Cal.App.3d 939, 947-948 & fn. 19.)

Nevertheless, as the California Supreme Court regularly does, we choose to analyze the merits of Wheeler's argument to preclude a claim that his counsel's failure to request additional inquiry constituted ineffective assistance of counsel. (See *People v. Williams* (1998) 61 Cal.App.4th 649, 657; see, e.g., *People v. Marshall* (1996) 13 Cal.4th 799, 831.) First, by completely ignoring Wheeler's father, the juror complied with the letter and the spirit of the relevant instruction to the jury:

> "During recesses, you must not discuss with anyone any subject connected with this trial. As far as people in the hallway, unless you're 100 percent sure that they don't have anything to do with this case, don't talk to them, not even hello or anything like that, because if somebody sees you talking to somebody that turns out to be a witness, even if it had nothing to do with the case, it just causes problems, as you can imagine."

Second, nothing in the record shows a violation of the court's instructions to "determine the facts from the evidence received in the trial and not from any other source" and not to "converse among yourselves or with anyone else on any subject connected with the trial" except when all 12 jurors were present in the jury room. To the contrary, the juror's comment that a "gentleman" asked her a question—on a record showing she had no idea he was Wheeler's father and did not say anything to any other juror about the topic of his question—had nothing at all to do with the jury's fact finding deliberations about the evidence at trial.

"Evidence obtained by jurors from sources other than in court is misconduct and constitutes grounds for a new trial if the defendant has been prejudiced thereby." (*People v. Williams* (1988) 44 Cal.3d 1127, 1156, citing Pen. Code, § 1181, subd. 2.) "'[Whether] a defendant has been injured by jury misconduct in receiving evidence outside of court necessarily depends upon whether the jury's impartiality has been adversely affected, whether the prosecutor's burden of proof has been lightened and whether any asserted defense has been contradicted. If the answer to any of these questions is in the affirmative, the defendant has been prejudiced and the conviction must

be reversed. On the other hand, since jury misconduct is not per se reversible, if a review of the entire record demonstrates that the appellant has suffered no prejudice from the misconduct a reversal is not compelled.' [Citation.]" (*People v. Williams*, *supra*, at p. 1156.)

On a thorough review of the record, we hold that the juror's comment neither adversely affected the jury's impartiality nor lightened the prosecutor's burden of proof nor contradicted any asserted defense. (See *People v. Williams*, *supra*, 44 Cal.3d at p. 1156.) On that ground, we hold that the court's failure to conduct additional inquiry into possible juror misconduct did not violate Wheeler's constitutional rights to a fair trial, an impartial jury, or due process.

III. Sentencing

A. Presentence conduct credit

The Attorney General argues Penal Code section 2933.2 precludes the court's award of 100 days of presentence conduct credits since Wheeler's count 1 conviction was for murder.[3] Wheeler argues the court properly awarded those credits since his counts 2 and 3 convictions were for other offenses.

Penal Code section 2933.2, subdivision (a) prohibits an award of presentence conduct credits to "*any person* who is convicted of murder." (Italics added.) An analogous statute prohibits an award of presentence conduct credits to "*any person* who

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[3]Penal Code section 2933.2: "(a) Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933. [¶] (b) The limitation provided in subdivision (a) shall apply whether the defendant is sentenced under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2 or sentenced under some other law. [¶] (c) Notwithstanding Section 4019 or any other provision of law, no credit pursuant to Section 4019 may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest for any person specified in subdivision (a). [¶] (d) This section shall only apply to murder that is committed on or after the date on which this section becomes operative."

is convicted of a felony offense listed in Section 667.5"[4] (Former Pen. Code, § 2933.1, italics added.) In *People v. Ramos* (1996) 50 Cal.App.4th 810 we held that "by its terms, [former Penal Code] section 2933.1 applies to the offender not to the offense and so limits a violent felon's conduct credits irrespective of whether or not all his or her offenses come within [Penal Code] section 667.5." (*Id*. at p. 817.) By parity of reasoning, we hold that Penal Code section 2933.2 applies to the offender not to the offense and so limits a murderer's conduct credits irrespective of whether or not all his or her offenses were murder. (See *People v. Herrera* (2001) 88 Cal.App.4th 1353, 1366-1367.) We will modify the judgment and order amendment of the abstract of judgment accordingly.

B. Penal Code Section 654[*]

Arguing that the Penal Code section 654 stay on count 2 lacked statutory authorization, the Attorney General requests modification of the judgment. A sentence without statutory authorization is reviewable on appeal even in the absence of a contemporary objection. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) The Attorney General requests amendment of the abstract of judgment to conform to that modification and requests two other amendments of the abstract of judgment to correct clerical errors.

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[4]Former Penal Code section 2933.1: "(a) Notwithstanding any other law, any person who is convicted of a felony offense listed in Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933. [¶] (b) The 15 percent limitation provided in subdivision (a) shall apply whether the defendant is sentenced under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2 or sentenced under some other law. However, nothing in subdivision (a) shall affect the requirement of any statute that the defendant serve a specified period of time prior to minimum parole eligibility, nor shall any offender otherwise statutorily ineligible for credit be eligible for credit pursuant to this section. [¶] (c) Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a). [¶] (d) This section shall only apply to offenses listed in subdivision (a) that are committed on or after the date on which this section becomes operative."

[*]See footnote, *ante*, page 1.

On the stay issue, the Attorney General argues, the "trial judge stayed execution of sentence on count 2, finding Penal Code section 654 barred separate punishment for discharging a firearm into the residence (count 2)," but "Penal Code section 654 does not bar separate punishments for crimes of violence against multiple victims." Since "shooting at a person and shooting at an inhabited dwelling," Wheeler argues, "technically violated two separate statutes," the stay for "shooting into an inhabited building (count 2)" was correct because both violations were "part of one continuous course of conduct." The record, however, shows the court imposed a stay of sentence not on discharge of a firearm at an inhabited dwelling, but on attempted voluntary manslaughter. For want of a valid premise, we reject the Attorney General's argument and Wheeler's argument alike.

On the first of the two clerical error issues, the Attorney General argues amendment of the abstract of judgment is necessary on the Penal Code section 12022.53, subdivision (d) enhancements in counts 1 and 3 since the court did not impose the two 25-year determinate terms the abstract of judgment shows but instead correctly imposed two 25 years to life terms. Wheeler agrees the original abstract of judgment was in error but argues the amended abstract of judgment is correct. The amended abstract of judgment, however, inconsistently shows imposition of a 25-year *determinate* term on the Penal Code section 12022.53, subdivision (d) enhancement in count 1 and an aggregate *indeterminate* term of 75 years to life on count 1 and the Penal Code section 12022.53, subdivision (d) enhancement on count 3. Where a discrepancy exists between the abstract of judgment and the judgment the reporter's transcript shows, the appellate court should order the trial court to correct the abstract of judgment. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 186-188.) We will order correction of the abstract of judgment to show consecutive 25 years to life *indeterminate* terms on the counts 1 and 3 Penal Code section 12022.53, subdivision (d) enhancements.

On the second of the two clerical error issues, the Attorney General argues amendment of the second page of the abstract of judgment is necessary to correct the date

of pronouncement of sentence from April 23, 2001, to May 23, 2001. The amended abstracts of judgment already in the record correct that error in the original abstract of judgment.

DISPOSITION

The judgment is modified to delete the award of 100 days of presentence conduct credits. (Pen. Code, § 2933.2.) The trial court shall issue an abstract of judgment so amended.

The trial court imposed consecutive 25 years to life *indeterminate* terms on the counts 1 and 3 Penal Code section 12022.53, subdivision (d) enhancements. The trial court shall issue an abstract of judgment so amended.

As so modified, the judgment is affirmed.

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GOMES, J.

WE CONCUR:

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DIBIASO, Acting P.J.

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WISEMAN, J.